

EXHIBIT “A”

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PATRICK R. CO, ESQ. BAR#: 200160
JOSHUA W. ROSE, ESQ. BAR#: 191024
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Attorneys for Defendant/Cross-Complainant/Cross-Defendant
PAULEY CONSTRUCTION, INC.

ENDORSED
FILED
San Francisco Superior Court
JAN - 9 2007
GORDON, JAMES A., Clerk
BY: _____ JUSPFI
JUDY J. JUD

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SIFA TUIAKI and LUPE TUIAKI,
Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC
COMPANY, PAULEY
CONSTRUCTION, INC., TRAFFIC
SOLUTIONS, INC., ADELPHIA
TELECOMMUNICATIONS CO., INC.,
SBC TELECOMMUNICATIONS, INC.,
MOBILE TOOL INTERNATIONAL, INC.
dba TELSTA, COUNTY OF
MENDOCINO, STATE OF
CALIFORNIA, PACIFIC BELL
TELEPHONE COMPANY, PACIFIC
TELESIS GROUP, SBC OPERATIONS,
INC., and DOES 1 to 50,

Defendants.

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**PAULEY CONSTRUCTION, INC.'S.
NOTICE OF MOTION AND MOTION
FOR JUDGMENT ON THE PLEADINGS**

Date: February 13, 2007
Time: 9:30 a.m.
Department: 301

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on February 13, 2007 at 9:30 a.m. or soon thereafter as the
matter can be heard in Department 301 of the above-noted Court, located at 400 McAllister Street, San
Francisco, California 94102, Cross-defendant PAULEY CONSTRUCTION, INC. will, and do hereby

1 move pursuant to Code of Civil Procedure §438 for entry of judgment on the pleadings in favor of
2 defendant PAULEY CONSTRUCTION, INC. and against Cross-complainant ADELPHIA
3 COMMUNICATIONS CORPORATION. The motion will be made on the ground that the Cross-
4 complaint fails to state facts sufficient to constitute causes of action for breach of contract and express
5 indemnity and are barred by law.

6 This motion is based on this Notice of Motion, on the Memorandum of Points and Authorities
7 in Support of Motion for Judgment on the Pleadings served and filed herewith, on the Request to Take
8 Judicial Notice, and on the files and records of this case; and any other oral and documentary evidence
9 as may be presented at the hearing of this motion.

10
11 DATED: January 8, 2007

CLAPP, MORONEY, BELLAGAMBA
and VUCINICH

12
13
14 By: 

JEFFREY M. VUCINICH

JOSHUA W. ROSE

Attorneys for Defendant/Cross-Complainant/
Cross-Defendant

PAULEY CONSTRUCTION, INC.

SIFA TUIAKI v. PACIFIC GAS AND ELECTRIC COMPANY, et al.
San Francisco Superior Court Case No. CGC-03-419761

PROOF OF SERVICE

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is 1111 Bayhill Drive, Suite 300, San Bruno, CA 94066. On the date indicated below, I served the within:

PAULEY CONSTRUCTION, INC'S. NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS

on the parties in this action by transmitting a true copy of the foregoing document(s) in the following manner:



(BY MAIL) Pursuant to Code of Civil Procedure §1013(a), I placed a true copy thereof enclosed in a sealed envelope, addressed as set forth below, and deposited each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Clapp, Moroney, Bellagamba & Vucinich. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing of in affidavit.

SEE ATTACHED SERVICE LIST



(BY PERSONAL SERVICE) I caused to be delivered by hand this date each of the above documents, to the following:



(BY FACSIMILE) I caused each of the above documents to be faxed this date to the offices of the following:

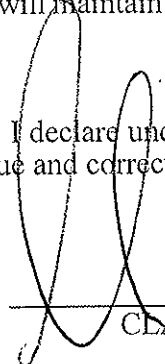


(BY FEDEX) I caused each of the above documents to be sent by FedEx this date to the offices of the following:



(BY LexisNexis FILE & SERVE) I caused to be delivered by LexisNexis File & Serve this date each of the above documents, for which our office will maintain the LexisNexis filing receipt, to the following:

Executed on January 8, 2007 at San Bruno, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



CLAUDIA GOMEZ

TUIAKI v. PACIFIC GAS & ELECTRIC COMPANY, et al.**San Francisco Superior Court Case No.: CGC-04-419761****Our Client: Pauley Construction, Inc.****Our File No.: 0017-03419****SERVICE LIST**

<p>Timothy G. Tietjen Rouda, Feder, Tietjen & Zanolini 44 Montgomery Street, Suite 4000 San Francisco, CA 94104 Telephone: (415) 398-5398 Facsimile: (415) 398-8169 <i>Attorneys for Plaintiffs</i> <i>Sifa Tuiaki and Lupe Tuiaki</i></p>	<p>Steven P. Burke, Esq. Matthew C. Lovell, Esq. Peter J. Messrobian, Esq. Sedgwick, Detert, Moran & Arnold One Market Plaza Steuart Tower, 8th Floor San Francisco, CA 94105 Telephone: (415) 781-7900 Facsimile: (415) 781-2635 <i>Attorneys for Defendant</i> <i>Pacific Gas & Electric Company</i></p>
<p>Robert Ford Rueben Jacobson Lewis Brisbois Bisgaard & Smith LLP One Sansome Street, Suite 1400 San Francisco, CA 94104 Telephone: (415) 362-2580 Facsimile: (415) 434-0882 <i>Attorneys for Defendants</i> <i>SBC WEST/PACIFIC TELESIS GROUP and</i> <i>ADELPHIA TELECOMMUNICATIONS CO., INC.</i></p>	<p>Steven D. Werth Mark Hazelwood Low, Ball & Lynch 505 Montgomery Street, 7th Floor San Francisco, CA 94111-2584 Telephone: (415) 981-6630 Facsimile: (415) 982-1634 <i>Attorneys for Cross-Defendant</i> <i>S.G. BARBER</i></p>
<p>Ralph Robinson Peter R. Crane Wilson, Elser, Moskowitz, Edelman & Dicker, LLP 525 Market Street, 17th Floor San Francisco, CA 94105-2725 Tel: (415) 433-0990 Fax: (415) 434-1370 <i>Attorneys for Defendant</i> <i>Mobile Tool International, Inc.</i></p>	<p>Ray L. Wong, Esq. Duane Morris LLP One Market Street Spear Tower, Suite 2000 San Francisco, CA 94105 Tel: (415) 957-3000 Fax: (415) 957-3001 e-mail: rlwong@duanemorris.com <i>Attorneys for American Premier</i> <i>Underwriters, Inc. and General Cable</i> <i>Corporation</i></p>

<p>Jorge Franco, Esq. Jennings, Haug & Cunningham LLP 2800 N. Central Avenue, Suite 1800 Phoenix, AZ 85004 Tel: (602) 234-7810 (direct) Cell: (602) 312-0888 Fax: (602) 277-5595 e-mail: jf@jhc-law.com <u>Personal Counsel for Pauley Construction,</u> <u>Inc.</u></p>	
--	--

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PAULEY CONSTRUCTION, INC.

SUPERIOR COURT OF CALIFORNIA
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SIFA TUIAKI and LUPE TUIAKI,
Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC
COMPANY, PAULEY
CONSTRUCTION, INC., TRAFFIC
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TELECOMMUNICATIONS CO., INC.,
SBC TELECOMMUNICATIONS, INC.,
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dba TELSTA, COUNTY OF
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INC., and DOES 1 to 50,

Defendants.

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PAULEY CONSTRUCTION, INC.'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Date: February 13, 2007
Time: 9:30 a.m.
Department: 301

I. INTRODUCTION

Cross-complainant ADELPHIA COMMUNICATIONS CORPORATION ("Adelphia") filed its Cross-complaint against Cross-defendant PAULEY CONSTRUCTION, INC. ("Pauley") and ROES 1 through 50, INCLUSIVE, on November 2, 2005. (A copy of Adelphia's Cross-complaint

1 is attached, as Exhibit A, to the Request to Take Judicial Noticed filed herewith). The Cross-
 2 complaint contains five (5) causes of action, all of which name Pauley. The first cause of action
 3 alleges implied equitable indemnity. The second cause of action alleges contribution. The third cause
 4 of action seeks declaratory relief. The fourth cause of action alleges breach of contract. The fifth
 5 cause of action alleges express indemnity.

6 For the reasons stated below, Pauley now moves for judgment on the pleadings on the grounds
 7 that Adelphia's fourth cause of action, for breach of contract fails, as the Cross-complaint does not
 8 state facts sufficient to constitute that cause of action against Pauley. In addition, Adelphia's fifth
 9 cause of action, for express indemnity fails, as the Cross-complaint does not state facts sufficient to
 10 constitute that cause of action against Pauley.

11 **II. ARGUMENT**

12 **A. A MOTION FOR JUDGMENT ON THE PLEADINGS IS** 13 **APPROPRIATE.**

14 Pursuant to Code of Civil Procedure § 438(c)(1)(B)(ii), a cross-defendant is entitled to
 15 judgment on the pleadings if the cross-complainant's cross-complaint does not state facts sufficient
 16 to constitute a cause of action. In addition, a cross-defendant can bring a motion as to the entire cross-
 17 complaint or any of the causes of action stated therein. C.C.P. § 438(c)(2)(A). See *Kabehie v. Zoland*
 18 (2002) 102 Cal.App.4th 513, 519.

19 **B. THE FACTS PLED IN ADELPHIA'S CROSS-COMPLAINT ARE** 20 **INSUFFICIENT TO SUPPORT ITS FOURTH CAUSE OF ACTION** 21 **FOR BREACH OF CONTRACT**

22 Adelphia's Cross-complaint states that on or about July 7, 2000, it entered into a written
 23 contract with Pauley for the Mendocino Rebuild Construction. (Cross-complaint 4:12-22) Adelphia's
 24 Cross-complaint states that Pauley breached the agreement by failing to defend and indemnify
 25 Adelphia. (Cross-complaint 9:12-16) Adelphia's Cross-complaint further states that as the result of
 26 Pauley's breach, it has been damaged in an amount according to proof, including, but not limited to
 27 attorney fees in defending this action. (Cross-complaint 9:16-21)
 28

Plaintiff must plead and prove the following essential elements to establish a cause of action for damages for breach of contract: (1) the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) resulting damage to plaintiff. *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830; *Lortz v. Connell* (1969) 273 Cal.App.2d 286, 290 (plaintiff's complaint fails to indicate either that plaintiff performed all that he was obligated to perform prior to that date, or that defendants had prevented him from rendering such performance); *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 459 (trial court properly sustained the Southern Pacific's demurrer as to the contract cause of action since Otworth's complaint includes no assertion that Otworth has either performed the contract or is excused from performing); *Walsh v. West Valley Mission Community College Dist.* (1998) 66 Cal.App.4th 1532, 1545. The plaintiff must prove ability to perform. *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625.

Here, to state a cause of action for breach of contract, Adelphia must plead the contract, its performance of the contract or excuse for nonperformance, Pauley's breach and the resulting damage. However, on its face, Adelphia's Cross-complaint fails to state a cause of action for breach of contract. It omits the required, essential element that Adelphia has performed under the contract. It includes no assertion that Adelphia has either performed the contract or is excused from performing.

In fact, Adelphia's ability to perform its obligations under the contract was extinguished on June 25, 2002, when it filed Chapter 11 Bankruptcy. Not only did Adelphia omit, in its Cross-complaint, an essential element of its purported breach of contract claim, but it cannot seek to enforce a contract against Pauley that it has not performed and cannot perform. Thus, Adelphia's fourth cause of action, for breach of contract fails, as the Cross-complaint does not state facts sufficient to constitute that cause of action against Pauley.

C. THE FACTS PLED IN ADELPHIA'S CROSS-COMPLAINT ARE INSUFFICIENT TO SUPPORT ITS FIFTH CAUSE OF ACTION FOR EXPRESS INDEMNITY.

Adelphia's fifth cause of action for express indemnity states that the agreement between Adelphia and Pauley contains an express indemnity provision which provides that Pauley will indemnify and hold harmless Adelphia from any and all liability. (Cross-complaint 9:27-28; 10:1-9).

1 Adelpia claims that it is entitled to express indemnity from Pauley as a result of the terms of the
2 written agreement. (Cross-complaint 10:7-9)

3 Adelpia's fifth cause of action is simply another way of restating the breach of contract cause
4 of action above. For the reasons stated above, it also fails. The Cross-complaint does not state facts
5 sufficient to constitute an express indemnity cause of action against Pauley. Again, Adelpia has
6 failed to plead an essential element, that it performed its obligations under the contract containing the
7 indemnity terms.

8 III. CONCLUSION

9 Adelpia has failed to state facts sufficient to constitute a causes of action for breach of
10 contract and express indemnity. Specifically, Adelpia has failed to plead an essential element, that
11 it performed under the contract. As such, Adelpia's fourth cause of action for breach of contract and
12 its fifth cause of action for express indemnity are barred as a matter of law. Pauley respectfully
13 requests that this motion for judgment on the pleadings be granted without leave to amend.

14
15 DATED: January 9, 2007

CLAPP, MORONEY, BELLAGAMBA
and VUCINICH

16
17
18 By: _____

JEFFREY M. VUCINICH
JOSHUA W. ROSE
Attorneys for Defendant/Cross-Complainant/
Cross-Defendant
PAULEY CONSTRUCTION, INC.

SIFA TUIAKI v. PACIFIC GAS AND ELECTRIC COMPANY, et al.
San Francisco Superior Court Case No. CGC-03-419761

PROOF OF SERVICE

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is 1111 Bayhill Drive, Suite 300, San Bruno, CA 94066. On the date indicated below, I served the within:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PAULEY CONSTRUCTION, INC.'S. MOTION FOR JUDGMENT ON THE PLEADINGS

on the parties in this action by transmitting a true copy of the foregoing document(s) in the following manner:

☒ (BY MAIL) Pursuant to Code of Civil Procedure §1013(a), I placed a true copy thereof enclosed in a sealed envelope, addressed as set forth below, and deposited each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Clapp, Moroney, Bellagamba & Vucinich. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing of in affidavit.

SEE ATTACHED SERVICE LIST

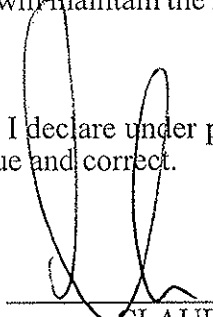
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Executed on January 8, 2007 at San Bruno, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



CLAUDIA GOMEZ

TUIAKI v. PACIFIC GAS & ELECTRIC COMPANY, et al.**San Francisco Superior Court Case No.: CGC-04-419761****Our Client: Pauley Construction, Inc.****Our File No.: 0017-03419****SERVICE LIST**

<p>Timothy G. Tietjen Rouda, Feder, Tietjen & Zanolini 44 Montgomery Street, Suite 4000 San Francisco, CA 94104 Telephone: (415) 398-5398 Facsimile: (415) 398-8169 <i>Attorneys for Plaintiffs</i> <i>Sifa Tuiaki and Lupe Tuiaki</i></p>	<p>Steven P. Burke, Esq. Matthew C. Lovell, Esq. Peter J. Messrobian, Esq. Sedgwick, Detert, Moran & Arnold One Market Plaza Steuart Tower, 8th Floor San Francisco, CA 94105 Telephone: (415) 781-7900 Facsimile: (415) 781-2635 <i>Attorneys for Defendant</i> <i>Pacific Gas & Electric Company</i></p>
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Attorneys for Defendant/Cross-Complainant/Cross-Defendant
PAULEY CONSTRUCTION, INC.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SIFA TUIAKI and LUPE TUIAKI,
Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC
COMPANY, PAULEY
CONSTRUCTION, INC., TRAFFIC
SOLUTIONS, INC., ADELPHIA
TELECOMMUNICATIONS CO., INC.,
SBC TELECOMMUNICATIONS, INC.,
MOBILE TOOL INTERNATIONAL, INC.
dba TELSTA, COUNTY OF
MENDOCINO, STATE OF
CALIFORNIA, PACIFIC BELL
TELEPHONE COMPANY, PACIFIC
TELESIS GROUP, SBC OPERATIONS,
INC., and DOES 1 to 50,

Defendants.

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**PAULEY CONSTRUCTION, INC'S.
REQUEST FOR JUDICIAL NOTICE
PURSUANT TO ITS MOTION FOR
JUDGMENT ON THE PLEADINGS**

Date: February 13, 2007
Time: 9:30 a.m.
Department: 301


TO THE HONORABLE JUDGE OF THE SAN FRANCISCO SUPERIOR COURT:

Pursuant to Evidence Code Section 452(d) and 453, Cross-defendant PAULEY
CONSTRUCTION, INC. respectfully requests that this Court take judicial of the files and the
following specified pleadings and documents from, *Sifa Tuiaki and Lupe Tuiaki v. Pacific Gas and*

1 *Electric Company, et al.*, San Francisco Superior Court Case No. CGC-03-419761 (Consolidated with
2 04-432476):

3 1. Adelphia's Cross-complaint, filed on November 2, 2005 in the current San Francisco
4 Superior Court Action No. CGC-03-419761 (Consolidated with 04-432476), attached hereto as
5 Exhibit A.

6 2. Pleadings and documents filed in United States Bankruptcy Court, Southern District
7 of New York, *In Re Adelphia Communications Corporation et al.*, Chapter 11 Cases, Case No. 02-
8 41729 (REG):

9
10 DATED: January , 2007

CLAPP, MORONEY, BELLAGAMBA
and VUCINICH

11
12
13 By: 

14 JEFFREY M. VUCINICH
15 JOSHUA W. ROSE
16 Attorneys for Defendant/Cross-Complainant/
17 Cross-Defendant
18 PAULEY CONSTRUCTION, INC.
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**ENDORSED
 FILED**
 San Francisco County Superior Court

NOV 02 2005

GORDON PARK LI, Clerk

BY: MARIA SANCHEZ
 Deputy Clerk

Attorneys for Defendant
 ADELPHIA COMMUNICATIONS CORPORATION and
 PACIFIC BELL TELEPHONE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SIFA TUIAKI and LUPE TUIAKI,

Plaintiffs,

v.

PACIFIC GAS & ELECTRIC, et al., and DOES
 1 to 50,

Defendants.

CASE NO. CGC-03-419761(consolidated with
 case no. GU-04-432476)

**ADELPHIA'S CROSS-COMPLAINT FOR
 BREACH OF CONTRACT, EXPRESS AND
 IMPLIED INDEMNITY, CONTRIBUTION,
 APPORTIONMENT OF FAULT AND
 DECLARATORY RELIEF AGAINST
 PAULEY CONSTRUCTION, INC. AND
 ROES 1 THROUGH 50, INCLUSIVE**

Complaint Filed: April 23, 2003
 Trial Date: None Set

ADELPHIA COMMUNICATIONS
 CORPORATION

Cross-Complainant,

v.

PAULEY CONSTRUCTION, INC. and ROES
 1 to 50, INCLUSIVE

Cross-Defendants

Cross-complainant, ADELPHIA COMMUNICATIONS CORPORATION also known as
 County Mendocino Cable TV dba Adelphia Cable Communications (hereinafter "Cross-
 complainant") complains as against cross-defendants, Pauley Construction, Inc. and Roes 1
 through 50, inclusive, and each of them, as follows:

GENERAL ALLEGATIONS

1. The true names and capacities, whether individual, corporate, associate, or

11/02/05 P

LEWIS BRISBOIS BISGAARD & SMITH LLP

ONE SANSOME STREET, SUITE 1400
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 362-2580

1 otherwise, of cross-defendants ROES 1 through 50 are unknown to cross-complainant, who
2 therefore sues said cross-defendants by such fictitious names. Cross-complainant is informed and
3 believes, and thereon alleges, that each of the cross-defendants designated herein as a fictitious
4 cross-defendant is in some manner responsible for the events and happenings referred to, and is
5 obligated to indemnify cross-complainant as alleged herein. Cross-complainant prays for relief to
6 amend this cross-complaint to allege their true names and capacities when the same have been
7 ascertained.

8 2. Cross-complainant alleges upon information in the belief that cross-defendant
9 Pauley Construction, Inc. is a duly licensed corporation authorized to do business in California.

10 3. Cross-complainant is informed and believes and on that basis alleges, that at all
11 times relevant each of the cross-defendants were and are doing business in the state of California,
12 County of San Francisco, and was the agent and employee of each of the remaining cross-
13 defendants, and was acting within the scope and purpose of said agency and employment.

14 4. Cross-complainant refers to the operative first amended complaint filed herein by
15 the plaintiffs in the matter entitled *Sifa Tuiaki and Lupe Tuiaki v. Adelpia Communications*
16 *Corporation, et al*, San Francisco County Superior Court Case No. CGC-03-419761
17 (consolidated with CGC-04-432476 and related consolidated actions), a copy of which is attached
18 hereto as Exhibit 1 to this cross-complaint and incorporated herein by reference, except that cross-
19 complainant denies each and every, all in singular, generally and specifically, the allegations
20 contained therein and so far as said allegations relate to or refer to this cross-complaint.

21 FIRST CAUSE OF ACTION

22 **(Implied Equitable Indemnity Against All Cross-Defendants)**

23 5. Cross-complainant incorporates by reference herein paragraphs 1 through 4 of the
24 general allegations.

25 6. Cross-complainant alleges that in the event Cross-complainant is found in some
26 manner legally liable to plaintiffs, to other cross-complainants, or to anyone else as a result of the
27 events and occurrences described in the aforementioned complaint attached as Exhibit 1 hereto,
28 and/or related cross-complaints, cross-defendants, and each of them, were negligent or in some

1 manner legally responsible in whole or in part for the damages, if any, sustained by plaintiffs, or
 2 other cross-complainants. In the event this cross-complainant is indeed held jointly liable with
 3 cross-defendants, cross-defendants shall be required to pay to this cross-complainant, plaintiffs or
 4 other cross-complainants a sum equal to the proportional share of plaintiffs' or other cross-
 5 complainant's damages proximately caused by the negligent and/or tortious conduct of cross-
 6 defendants.

7 SECOND CAUSE OF ACTION

8 (Contribution Against All Cross-Defendants)

9 7. Cross-complainant incorporates by reference herein paragraphs 1 through 4 of the
 10 general allegations.

11 8. Cross-complainant alleges that in the event Cross-complainant is found in some
 12 manner legally liable to plaintiff, other cross-complainants, or to anyone else as a result of the
 13 events and occurrences described in the aforementioned Complaint, and/or Cross-Complaints, then
 14 any injuries and/or damages to plaintiffs or other cross-complainants are solely and/or substantially
 15 caused by the negligence and carelessness of cross-defendants. Therefore cross-complainant is
 16 entitled to have the quantum of negligence of cross-defendants determined by this Court.

17 9. Cross-complainant further alleges that in the event Cross-complainant is found in
 18 some manner legally liable to plaintiffs, other cross-complainants, or to anyone else as a result of
 19 the events and occurrences described in the aforementioned Complaint, and/or Cross-Complaints,
 20 this cross-complainant is entitled to contribution from cross-defendants in any amount which
 21 cross-complainant pays to plaintiffs or other cross-complainants in excess of this cross-
 22 complainant's pro rata share of the judgement.

23 THIRD CAUSE OF ACTION

24 (Declaratory Relief Against All Cross-Defendants)

25 10. Cross-complainant incorporates by reference herein paragraphs 1 through 4 of the
 26 general allegations.

27 11. A dispute has arisen and an actual controversy exists between this cross-
 28 complainant and cross-defendants in relation to the following:

a. The respective liability for plaintiffs and/or other cross-complainants damages, if any;

b. Whether cross-defendants must defend and/or indemnify this cross-complainant for damages which Cross-complainant may be obligated to pay to plaintiffs and/or other cross-complainants; and

c. Whether cross-defendants must pay the reasonable attorneys' fees and costs incurred by this cross-complainant in the defense of this action.

10. A declaration of respective liability and rights to indemnity is necessary as this cross-complainant has no other adequate remedy at law and such declaration will avoid circuitry and multiplicity of actions that will otherwise be required if this cross-complainant must defend this action and then bring a separate action against cross-defendants.

FOURTH CAUSE OF ACTION

(Breach of Contract Against Pauley Construction, Inc. and ROES 1 through 10, inclusive, only)

11. Cross-complainant incorporates by reference herein paragraphs 1 through 4 of the general allegations.

12. Cross-complainant and cross-defendant Pauley Construction, Inc. (hereinafter "Pauley") entered into a contract made as of the 7th day of July, 200, wherein Pauley and ROE cross-defendants agreed to be the general contractor for the Mendocino Rebuild Construction. A copy of this contract is attached to this pleading as Exhibit 2 and is incorporated by reference herein in its entirety. Pursuant to Exhibit 2, Pauley was required to comply fully with all regulations, standards and statutes with respect to occupational health and safety.

13. Pursuant to Exhibit 2, Pauley and ROE cross-defendants agreed to keep in force the following insurance:

23. INSURANCE

All policies shall contain all endorsements, including but not limited to independent Contractors, broad form damage, products and completed operations, explosion, collapse and underground hazard, comprehensive

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1 form, contractual insurance and personal injury. No policy may be canceled
2 or materially changed without Adelphia's written consent. Adelphia shall
3 receive no less than sixty (60) days prior written notice of any such
4 proposed cancellation or material change. Adelphia reserves the right to
5 terminate this Agreement in the event of a breach or noncompliance with
6 this Agreement.

7
8 The Contractor shall furnish Adelphia with a copy of all policies of
9 insurance required by this Section 24 as well as a certificate of insurance
10 evidencing the existence of the aforementioned insurance and naming
11 Adelphia as additional insured, delivered to the appropriate municipality,
12 power company, telephone company and such other parties as may be
13 required, certificates of insurance evidencing such insurance coverage and
14 naming such parties as additional named insured.

15 The contractor shall obtain, as its sole cost and expense, any additional
16 insurance or added coverage as may be necessary under local law.

17 Adelphia's cable television franchise or advisable in Contractor's opinion to
18 protect all the on-site property and equipment of Adelphia or third parties or
19 any of Contractor's employees or subcontractors.

20 Before commencing work, Contractor shall procure and maintain insurance
21 of the kinds and limits enumerated hereunder and on terms and with an
22 insurance carrier satisfactory to Adelphia. Certificates of such insurance
23 issued by the Contractor's insurance carrier shall be filed with Adelphia
24 before the commencement of such work and shall set forth the following:

25 A. Workmen's Compensations

26 Contractor's possession of Workmen's Compensation Insurance in accordance with
27 the laws of the State of CALIFORNIA.

28 B. Comprehensive General Liability

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1 Bodily Injury \$1,000,000 - per occurrence
 2 Property Damage \$1,000,000 - per occurrence
 3 C. Employer's Liability Coverage \$ 500,000 - per occurrence
 4 D. Comprehensive Automobile Liability - Including non-owned and hired
 5 coverage
 6 a. Property damage \$1,000,000
 7 b. Bodily injury \$1,000,000
 8 E. Umbrella Liability Insurance \$5,000,000
 9 F. Property Damage

10 That the Contractor has insured in the joint names of Adelphia and the Contractor
 11 for the work to be performed hereunder against all loss or damage from whatever
 12 causes, other than for excepted risks for which insurance cannot be obtained.

13 G. Notice of Termination or Cancellation

14 That the foregoing insurance coverage shall not be terminated or cancelled unless
 15 Adelphia is given sixty (60) days prior written notice by the insurance carrier.

16 Cross-complainant is to be named as additional named insured on Pauley's
 17 insurance policy under the terms of Exhibit 2.

18 14. Pursuant to Exhibit 2, Pauley and ROE cross-defendants also agreed to indemnify,
 19 hold harmless and defend cross-complainant against any claims, damages, losses, expenses, and
 20 attorneys' fees that may be sustained by or recovered against them pursuant to the performance of
 21 Exhibit 2 by Pauley or any subcontractors hired by Pauley. However, Pauley has refused to accept
 22 cross-complainant's tender of its defense and indemnity despite cross-complainant's written
 23 request that Pauley accept its defense and indemnity. The relevant portion of Exhibit 2 states as
 24 follows:

25 24. INDEMNIFICATION

26 A. Contractor agrees to indemnify, defend and hold Adelphia harmless
 27 from any and all liability, claims, damages, causes of action,
 28

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1 expenses, fines, judgments, sums of money awarded by arbitration
2 or otherwise and any demands whatsoever arising out of or resulting
3 from the acts, omissions or wrongdoing on the part of any employee,
4 officer, agent, servant or representative of Contractor or any
5 subcontractor engaged by Contractor. This indemnification from
6 any and all liability, claims and demands whatsoever made by reason
7 of the injury or death of any person or the physical damage to
8 property or property rights or by reason of the termination,
9 disturbance, interruption or other interference with services of any
10 type including, without limitation, any aerial or underground
11 installation, utility or other facility damaged, harmed or disturbed, or
12 caused to be damaged, harmed or disturbed by contractor or
13 subcontractor. Contractor shall be responsible for each and every
14 violation of easements and rights-of-way caused by the obstruction
15 of streets, alleys, sidewalks and shall be responsible for any personal
16 injury or death or physical damage to property resulting from such
17 obstructions, or violations of easements or rights-of-way.

18
19 B. Contractor shall also be fully responsible for and indemnify, defend
20 and hold Adelphia harmless from any damages, losses or claims
21 resulting from Contractor's failure to advise Adelphia of any
22 problem or any nonconforming existing conditions, or any errors or
23 omissions in the plans specifications pertaining to work to be
24 performed by Contractor hereunder in accordance with this
25 Agreement of which it is aware or reasonably should have been
26 aware.

27
28 C. Contractor also specifically acknowledges and agrees that it shall

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1 indemnify, defend and hold Adelphia harmless from all damages,
2 claims or liabilities arising out of Contractor's failure to comply
3 with the notice and mark out provisions of any utility regulation or
4 practice.

5
6 D. Contractor shall defend all suits and claims, and shall hold and save
7 Adelphia harmless from liability of any nature or kind; including,
8 but not limited to, costs and expenses for or on any account of
9 infringement of any article or process supplied by Contractor; and
10 incorporated or used in the work to be performed under this
11 Agreement including its use by Adelphia.

12
13 E. Contractor shall indemnify, defend and hold harmless Adelphia from
14 and against all suits or claims based upon any injury (including
15 death) or loss to any persons or property that may occur in the course
16 of performance by this Agreement by Contractor whether such claim
17 shall be made by any employee or subcontractor of Contractor or by
18 a third person and whether or not it shall be claimed or found by a
19 court of law or administrative authority that the injury (including
20 death) was caused through the acts, omissions or wrongdoing of
21 Contractor and, at its own expense, Contractor shall defend any and
22 all such actions and shall pay all charges of attorneys and all costs
23 and expenses arising therefrom. The limits of liability provided in
24 any insurance policy shall not be a limit to Contractor's liability.

25
26 F. Contractor shall indemnify and hold harmless Adelphia from and
27 against all suits, claims, damages, costs, liabilities, including
28 payment of reasonable attorney's fees, for or on account of

1 infringement of any U.S. patent relating to any article or process
2 supplied by Contractor and incorporated or used in the work to be
3 performed under this Agreement.

4 15. Pauley also contracted under Paragraph 29 to be responsible for "SAFETY" as
5 follows:

6 A. Contractor shall be responsible for safety related to and during the
7 performance of the work hereunder. Contractor shall insure that its
8 employees and the employees of its subcontractors are notified of and
9 observe and abide by all safety regulations and laws including but not
10 limited to those issued by Adelpia and any revisions of the foregoing that
11 may hereinafter be applicable.

12 16. Cross-defendant Pauley and ROE cross-defendants have breached the agreement
13 with cross-complainant by failing to defend and indemnify cross-complainant pursuant to this
14 agreement in response to cross-complainant's tender of the defense and indemnity to Pauley and
15 ROE cross-defendants.

16 17. As a result of the foregoing breaches, acts and omissions of cross-defendant Pauley
17 and ROE cross-defendants in breaching the agreement, cross-complainant has been damaged in an
18 amount according to proof, including but not limited to attorney fees and costs in defending this
19 action and is entitled to recover those attorney fees and costs from Pauley and ROE cross-
20 defendants and is further entitled to indemnity.

21 **FIFTH CAUSE OF ACTION**

22 (Express Indemnity Against Pauley Construction, Inc.
23 and ROES 1 through 10, inclusive, only)

24 24. Cross-complainant incorporates by reference herein paragraphs 1 through 4 of the
25 general allegations and paragraphs 11 through 17, inclusive, as if fully set forth herein in support
26 of this fifth cause of action.

27 25. Cross-complainant alleges that the agreement between cross-complainant and
28 Pauley and ROE cross-defendants contains an express and implied indemnity provision which

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1 provides that Pauley and ROE cross-defendants will indemnify and hold harmless cross-
 2 complainant from any and all liability, including reasonable attorneys' fees and costs, incurred in
 3 any legal action naming cross-complainant as a defendant, arising from cross-complainant's
 4 execution of duties under the agreements, and also arising from the acts or omissions of such
 5 cross-defendants and as against any parties who may allege (as against cross-complainant and/or
 6 such cross-defendant) injuries, damages, statutory violations, and any other allegations. Cross-
 7 complainant has tendered its defense and indemnity in this action to Pauley, but its tender has thus
 8 far been refused. Based upon the foregoing, Cross-complainant is entitled to express indemnity
 9 from cross-defendants.

10 WHEREFORE, Cross-complainant prays for judgment against Pauley and ROE cross-
 11 defendants, as follows:

12 1. For judgment against Pauley and ROE cross-defendants, and each of them declaring
 13 that Pauley and ROE cross-defendants are under a duty to provide an immediate defense to cross-
 14 complainant, to reimburse cross-complainant for costs and attorney fees incurred in the defense of
 15 this action due to Pauley and ROE cross-defendants' refusal to defend cross-complainant and to
 16 declare that Pauley and Roe cross-defendants indemnify cross-complainant for the full amount of
 17 any judgment entered against cross-complainant herein or any settlement entered into by cross-
 18 complainant with plaintiffs herein;

19 2. For judgment against Pauley and ROE cross-defendants, and each of them,
 20 declaring that the liability for the damages alleged by plaintiffs must be born proportionally on a
 21 pro rata basis by plaintiffs, defendants, cross-complainant, cross-defendants, and each of them;

22 3. For judgment against Pauley and ROE cross-defendants, and each of them,
 23 declaring that cross-defendants are under a duty to contribute and indemnify cross-complainant in
 24 proportion to their own comparative responsibility for any damages plaintiffs might realize against
 25 cross-complainant;

26 4. For total and complete indemnity for any judgment(s) rendered against cross-
 27 complainant;

28 5. For judgment in proportionate share from other cross-defendants;

1 6. For a judicial determination that cross-defendants were the legal cause of any
2 injuries and damages sustained by plaintiffs, and that cross-defendants must indemnify cross-
3 complainant either completely or partially for any sums of money which may be recovered against
4 cross-complainant by plaintiff.

5 7. For costs of suit and attorneys' fees according to proof; and

6 8. For such other and further relief as is fair, just, and equitable.

7
8 DATED: November 2, 2005

LEWIS BRISBOIS BISGAARD & SMITH LLP

9
10
11 By 

12 Reuben B. Jacobson
13 Attorneys for Defendant and Cross-Complainant
14 ADELPHIA COMMUNICATIONS CORPORATION
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SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 362-2580

SIFA TUIAKI v. PACIFIC GAS AND ELECTRIC COMPANY, et al.
San Francisco Superior Court Case No. CGC-03-419761

PROOF OF SERVICE

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is 1111 Bayhill Drive, Suite 300, San Bruno, CA 94066. On the date indicated below, I served the within:

PAULEY CONSTRUCTION, INC'S. REQUEST FOR JUDICIAL NOTICE PURSUANT TO ITS MOTION FOR JUDGMENT ON THE PLEADINGS

on the parties in this action by transmitting a true copy of the foregoing document(s) in the following manner:

☒ (BY MAIL) Pursuant to Code of Civil Procedure §1013(a), I placed a true copy thereof enclosed in a sealed envelope, addressed as set forth below, and deposited each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Clapp, Moroney, Bellagamba & Vucinich. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing of in affidavit.

SEE ATTACHED SERVICE LIST

☐ (BY PERSONAL SERVICE) I caused to be delivered by hand this date each of the above documents, to the following:

☐ (BY FACSIMILE) I caused each of the above documents to be faxed this date to the offices of the following:

☐ (BY FEDEX) I caused each of the above documents to be sent by FedEx this date to the offices of the following:

☐ (BY LexisNexis FILE & SERVE) I caused to be delivered by LexisNexis File & Serve this date each of the above documents, for which our office will maintain the LexisNexis filing receipt, to the following:

Executed on January 8, 2007 at San Bruno, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



CLAUDIA GOMEZ

TUIAKI v. PACIFIC GAS & ELECTRIC COMPANY, et al.

San Francisco Superior Court Case No.: CGC-04-419761

Our Client: Pauley Construction, Inc.

Our File No.: 0017-03419

SERVICE LIST

<p>Timothy G. Tietjen Rouda, Feder, Tietjen & Zanolini 44 Montgomery Street, Suite 4000 San Francisco, CA 94104 Telephone: (415) 398-5398 Facsimile: (415) 398-8169 <i>Attorneys for Plaintiffs</i> <i>Sifa Tuiaki and Lupe Tuiaki</i></p>	<p>Steven P. Burke, Esq. Matthew C. Lovell, Esq. Peter J. Messrobian, Esq. Sedgwick, Detert, Moran & Arnold One Market Plaza Steuart Tower, 8th Floor San Francisco, CA 94105 Telephone: (415) 781-7900 Facsimile: (415) 781-2635 <i>Attorneys for Defendant</i> <i>Pacific Gas & Electric Company</i></p>
<p>Robert Ford Rueben Jacobson Lewis Brisbois Bisgaard & Smith LLP One Sansome Street, Suite 1400 San Francisco, CA 94104 Telephone: (415) 362-2580 Facsimile: (415) 434-0882 <i>Attorneys for Defendants</i> <i>SBC WEST/PACIFIC TELESIS GROUP and</i> <i>ADELPHIA TELECOMMUNICATIONS CO., INC.</i></p>	<p>Steven D. Werth Mark Hazelwood Low, Ball & Lynch 505 Montgomery Street, 7th Floor San Francisco, CA 94111-2584 Telephone: (415) 981-6630 Facsimile: (415) 982-1634 <i>Attorneys for Cross-Defendant</i> <i>S.G. BARBER</i></p>
<p>Ralph Robinson Peter R. Crane Wilson, Elser, Moskowitz, Edelman & Dicker, LLP 525 Market Street, 17th Floor San Francisco, CA 94105-2725 Tel: (415) 433-0990 Fax: (415) 434-1370 <i>Attorneys for Defendant</i> <i>Mobile Tool International, Inc.</i></p>	<p>Ray L. Wong, Esq. Duane Morris LLP One Market Street Spear Tower, Suite 2000 San Francisco, CA 94105 Tel: (415) 957-3000 Fax: (415) 957-3001 e-mail: rlwong@duanemorris.com <i>Attorneys for American Premier</i> <i>Underwriters, Inc. and General Cable</i> <i>Corporation</i></p>

<p>Jorge Franco, Esq. Jennings, Haug & Cunningham LLP 2800 N. Central Avenue, Suite 1800 Phoenix, AZ 85004 Tel: (602) 234-7810 (direct) Cell: (602) 312-0888 Fax: (602) 277-5595 e-mail: jf@jhc-law.com <u>Personal Counsel for Pauley Construction,</u> <u>Inc.</u></p>	
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JEFFREY M. VUCINICH, ESQ. BAR#: 67906
PATRICK R. CO, ESQ. BAR#: 200160
JOSHUA W. ROSE, ESQ. BAR# 191024
CLAPP, MORONEY, BELLAGAMBA and VUCINICH
A PROFESSIONAL CORPORATION
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San Bruno, CA 94066
(650) 989-5400 (650) 989-5499 FAX

Attorneys for Defendant/Cross-Complainant/Cross-Defendant
PAULEY CONSTRUCTION, INC.

ENDORSED
FILED
San Francisco County Superior Court
FEB - 6 2007
GORDON PARK-LI, Clerk
BY ELIZABETH ZALDIVAR
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SIFA TUIAKI and LUPE TUIAKI,
Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC
COMPANY, PAULEY
CONSTRUCTION, INC., TRAFFIC
SOLUTIONS, INC., ADELPHIA
TELECOMMUNICATIONS CO., INC.,
SBC TELECOMMUNICATIONS, INC.,
MOBILE TOOL INTERNATIONAL, INC.
dba TELSTA, COUNTY OF
MENDOCINO, STATE OF
CALIFORNIA, PACIFIC BELL
TELEPHONE COMPANY, PACIFIC
TELESIS GROUP, SBC OPERATIONS,
INC., and DOES 1 to 50,

Defendants.

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**PAULEY CONSTRUCTION, INC.'S.
REPLY TO ADELPHIA
COMMUNICATIONS CORPORATION'S
OPPOSITION TO MOTION FOR
JUDGMENT ON THE PLEADINGS**

Date: February 13, 2007
Time: 9:30 a.m.
Department: 301

PAULEY CONSTRUCTION, INC. ("Pauley") briefly Replies to the arguments made in
ADELPHIA COMMUNICATIONS CORPORATION'S ("Adelphia") Opposition to Pauley's
Motion for Judgement on the Pleadings in turn.

First, Pauley's motion is not procedurally defective. There is no trial date set at this time.

1 Unless the Court orders otherwise, the statutory motion for judgment on the pleadings cannot be
2 made after entry of a pretrial conference order or 30 days before the initial trial date, whichever is
3 later. (C.C.P. §438(e).) On January 14, 2004, the Court set the matter for trial to begin on July 19,
4 2004, *unless objected to*. The parties objected, so the trial date was never actually set. Thereafter,
5 on June 28, 2004, the Court set the matter for trial to begin on January 3, 2005, *unless objected to*.
6 The parties objected, so the trial date was never actually set. Thereafter, on August 10, 2005, the
7 Court set the matter for trial to begin on February 14, 2006, *unless objected to*. The parties
8 objected, so the trial date was never actually set. In fact, each time, the case was removed from
9 the master jury calendar. "A motion for judgment on the pleadings can be made at any time either
10 prior to the trial or at the trial itself." (*Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650.) While
11 this case was decided before C.C.P. § 438 was enacted, it is still good law and the Court may rely
12 on it. Pauley's motion is timely. Finally, even if the Court determines that Pauley's motion is
13 untimely, which it is not, it has the discretion to advance the interests of all parties by hearing the
14 motion and avoiding a trial. (See *Burnett v. Chimney Sweep* (2004) 123 Cal.App 4th 1057.) All
15 parties have settled with plaintiffs, thus the only remaining issue in this litigation is Adelphia's
16 express contractual indemnity claim arising out of its Cross-complaint against Pauley.

17 Second, Adelphia's tender to Pauley is irrelevant here. It does not prove that Adelphia
18 "must have performed." Adelphia tried to argue this in its motion for summary adjudication
19 against Pauley. The motion was denied. Although pleadings are to be liberally construed,
20 Adelphia's opposition fails to account for its missing element. The fact remains that Adelphia's
21 Cross-complaint omits the required, essential element that Adelphia has performed under the
22 contract. In addition, Adelphia's counsel cannot ethically and in good faith claim now that
23 Adelphia has either performed the contract, or is excused from performing, because it hasn't and it
24 isn't.

25 This brings us to Pauley's final point. If Adelphia is permitted to amend its facially
26 deficient Cross-complaint, then Pauley will move this Court for an order of sanctions against Mr.
27 Jacobsen, or other counsel executing an amended Cross-complaint on Adelphia's behalf, under
28

1 California Code of Civil Procedure Section 128.7. Section 128.7 states in relevant part:

2 (a) Every pleading...shall be signed by at least one attorney of record in
 3 the attorney's individual name...(b) By presenting to the court, whether
 4 by signing, filing, submitting, or later advocating, a pleading...an
 5 attorney...is certifying that to the best of the person's knowledge,
 6 information, and belief, formed after an inquiry reasonable under the
 7 circumstances, all of the following conditions are met: (1) It is not being
 8 presented primarily for an improper purpose, such as to harass or to cause
 9 unnecessary delay or needless increase in the cost of litigation. (2) The
 10 claims, defenses, and other legal contentions therein are warranted by
 11 existing law or by a nonfrivolous argument for the extension,
 12 modification, or reversal of existing law or the establishment of new law.
 13 (3) The allegations and other factual contentions have evidentiary support
 14 or, if specifically so identified, are likely to have evidentiary support after
 15 a reasonable opportunity for further investigation or discovery. (4) The
 16 denials of factual contentions are warranted on the evidence or, if
 17 specifically so identified, are reasonably based on a lack of information
 18 or belief. (c) If, after notice and a reasonable opportunity to respond, the
 19 court determines that subdivision (b) has been violated, the court may,
 20 subject to the conditions stated below, impose an appropriate sanction
 21 upon the attorneys, law firms, or parties that have violated subdivision
 22 (b) or are responsible for the violation. In determining what sanctions, if
 23 any, should be ordered, the court shall consider whether a party seeking
 24 sanctions has exercised due diligence..."

25 Here, Adelphia's counsel cannot certify that Adelphia has performed or is excused from
 26 performing its contractual duties under the July 7, 2000 Adelphia - Pauley contract. On June 25,
 27 2002, Adelphia filed for Chapter 11 Bankruptcy, thus breaching the contract. Adelphia's attempt
 28 to amend its Cross-complaint now is unwarranted by existing law and lacks evidentiary support.

Respectfully submitted.

///

DATED: February 6, 2007

CLAPP, MORONEY, BELLAGAMBA
and VUCINICH

By: 

JEFFREY M. VUCINICH
JOSHUA W. ROSE

Attorneys for Defendant/Cross-Complainant/
Cross-Defendant
PAULEY CONSTRUCTION, INC.

SIFA TUIAKI v. PACIFIC GAS AND ELECTRIC COMPANY, et al.

San Francisco Superior Court Case No. CGC-03-419761

PROOF OF SERVICE

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is 1111 Bayhill Drive, Suite 300, San Bruno, CA 94066. On the date indicated below, I served the within:

PAULEY CONSTRUCTION, INC.'S. REPLY TO ADELPHIA COMMUNICATIONS CORPORATION'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

on the parties in this action by transmitting a true copy of the foregoing document(s) in the following manner:

☐

(BY MAIL) Pursuant to Code of Civil Procedure §1013(a), I placed a true copy thereof enclosed in a sealed envelope, addressed as set forth below, and deposited each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Clapp, Moroney, Bellagamba & Vucinich. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing of in affidavit.

☒

(BY PERSONAL SERVICE) I caused to be delivered by hand this date each of the above documents, to the following:

Robert Ford
Rueben Jacobson
Lewis Brisbois Bisgaard & Smith LLP
One Sansome Street, Suite 1400
San Francisco, CA 94104
Telephone: (415) 362-2580
Facsimile: (415) 434-0882

Attorneys for Defendants

SBC WEST/PACIFIC TELESIS GROUP and ADELPHIA TELECOMMUNICATIONS CO., INC.

☐

(BY FACSIMILE) I caused each of the above documents to be faxed this date to the offices of the following:

☐

(BY FEDEX) I caused each of the above documents to be sent by FedEx this date to the offices of the following:

☐

(BY LexisNexis FILE & SERVE) I caused to be delivered by LexisNexis File & Serve this date each of the above documents, for which our office will maintain the LexisNexis filing receipt, to the following:

Executed on February 6, 2007 at San Bruno, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


AARON ZETZER

SIFA TULAKI v. PACIFIC GAS AND ELECTRIC COMPANY, et al.

San Francisco Superior Court Case No. CGC-03-419761

PROOF OF SERVICE

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SEE ATTACHED SERVICE LIST



(BY PERSONAL SERVICE) I caused to be delivered by hand this date each of the above documents, to the following:



(BY FACSIMILE) I caused each of the above documents to be faxed this date to the offices of the following:

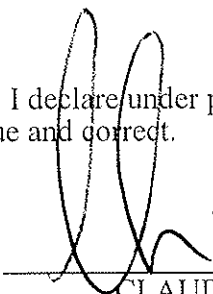


(BY FEDEX) I caused each of the above documents to be sent by FedEx this date to the offices of the following:



(BY LexisNexis FILE & SERVE) I caused to be delivered by LexisNexis File & Serve this date each of the above documents, for which our office will maintain the LexisNexis filing receipt, to the following:

Executed on February 6, 2007 at San Bruno, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



CLAUDIA GOMEZ

TUIAKI v. PACIFIC GAS & ELECTRIC COMPANY, et al.
San Francisco Superior Court Case No.: CGC-04-419761
Our Client: Pauley Construction, Inc.
Our File No.: 0017-03419

SERVICE LIST

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**ENDORSED
FILED**
 San Francisco County Superior Court

FEB 13 2007

Attorneys for Defendant/Cross-Complainant/Cross-Defendant
 PAULEY CONSTRUCTION, INC.

GORDON PARK-LI, Clerk
 BY: MARJORIE SCHWARTZ-SCOTT
 Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SAN FRANCISCO

SIFA TUIAKI and LUPE TUIAKI,
 Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC
 COMPANY, PAULEY
 CONSTRUCTION, INC., TRAFFIC
 SOLUTIONS, INC., ADELPHIA
 TELECOMMUNICATIONS CO., INC.,
 SBC TELECOMMUNICATIONS, INC.,
 MOBILE TOOL INTERNATIONAL, INC.
 dba TELSTA, COUNTY OF
 MENDOCINO, STATE OF
 CALIFORNIA, PACIFIC BELL
 TELEPHONE COMPANY, PACIFIC
 TELESIS GROUP, SBC OPERATIONS,
 INC., and DOES 1 to 50,

Defendants.

CASE NO.: CGC-03-419761 (Consolidated
 with 04-432476)

**~~PROPOSED~~ ORDER GRANTING
 PAULEY CONSTRUCTION, INC.'S
 MOTION FOR JUDGMENT ON THE
 PLEADINGS**

Date: February 13, 2007
 Time: 9:30 a.m.
 Department: 301
 Judge: Peter J. Busch

The Motion for Judgment on the Pleadings brought by Defendant, Cross-defendant and Cross-complainant, Pauley Construction, Inc., seeking an order granting judgment on the pleadings as to Adelphia Communication Corporation's Cross-complaint alleging causes of action for breach of contract and express indemnity having been presented to this Court:

1 IT APPEARING TO THE SATISFACTION OF THE COURT THAT the Motion of Pauley
2 Construction, Inc. was made pursuant to and in accordance with the provisions of CALIFORNIA CODE
3 OF CIVIL PROCEDURE §438.

4 (1) Defendant Pauley Construction Inc's. motion for judgment on the pleadings is
5 GRANTED as Adelphia Communications Corporation has failed to plead an essential element of its
6 breach of contract and express indemnity causes of action, namely that it performed its obligations or
7 is excused from performing its obligations under the contract containing the indemnity terms; and

8 (2) Cross-complainant Adelphia Communications Corporation is provided with ten (10)
9 days leave in which to amend its Cross-complaint.

10 IT IS SO ORDERED

11
12 Dated: FEB 13 2007, 2007

PETER J. BUSCH

JUDGE OF THE SUPERIOR COURT

PETER J. BUSCH